

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN M. ELLS, Personal Representative of the
ESTATE of MAYNARD B. ELLS,

UNPUBLISHED
February 7, 2006

Plaintiff-Appellee,

v

EATON COUNTY ROAD COMMISSION,

No. 264635
Eaton Circuit Court
LC No. 05-000128-NI

Defendant-Appellant.

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

BANDSTRA, P.J. (*dissenting*).

To successfully plead a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty, the defendant breached that duty, the plaintiff suffered harm, and the plaintiff's harm was caused by the defendant's negligence. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Further, where the defendant is a governmental entity, the plaintiff must allege facts that place the claim within an exception to governmental immunity. *Id.* at 302-304.

The highway exception, upon which plaintiff relies, requires a "governmental agency having jurisdiction over a highway"¹ to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). "The duty of the . . . county road commission to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel. . . ." *Id.* Stated another way, "if the [dangerous or defective] condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162; 615 NW2d 702 (2000).

Here, the signs and barricade had been placed on the roadbed to alert passersby that the road was closed to thru traffic and that a detour existed, but that the road was open to a local golf

¹ Defendant does not dispute that it had jurisdiction over the roadway where the accident occurred.

course. Our Supreme Court has noted that, under the highway exception, the government's duty is only implicated upon its failure to repair or maintain "the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage," and that "[t]his does not include signage." *Id.* at 185. Thus, while the signs and barricade were placed on the actual roadbed (i.e., *between* the two edges of the roadbed), I conclude that the accident here was not caused by defendant's failure to repair or maintain the actual physical structure of the roadbed surface. Stated another way, the barricade and signs did not constitute a "dangerous or defective condition[]" in the actual roadbed itself." *Id.* at 177 (i.e., *a part of* the actual physical structure of the roadbed surface).

Additionally, this Court has held that liability for the failure to maintain a highway exists only if the defect complained of is "actually and specifically included" in the statutory definition of the term "highway." *Ridley v Detroit (On Second Remand)*, 258 Mich App 511, 516; 673 NW2d 448 (2003). Because barricades and signs are not part of the definition of "highway" as set out in MCL 691.1401(e), they do "not represent a defect in the highway itself because [they are] not part of the highway." *Ridley, supra* at 515.

Consistent with our Supreme Court's mandate to narrowly construe the statutory exceptions to the broad grant of governmental immunity, *Nawrocki, supra* at 158, I conclude that plaintiff failed to plead in avoidance of governmental immunity, and the trial court erred in denying defendant's motion for summary disposition. Given that conclusion, I would not consider defendant's alternative arguments that the trial court erred in failing to address its claims that plaintiff failed to provide it proper notice under MCL 691.1404, and that it could not be held liable for failing to anticipate the negligence of plaintiff's decedent.

I would reverse and remand for entry of an order granting summary disposition in favor of defendant.

/s/ Richard A. Bandstra